APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED VAN DYKEN, Petitioner-Appellant, v RICK DAY; ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondent-Appellees.	)	NO. CA 97-35550 DC No. CV-94-00006-CCL MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted July 6, 1998
Seattle, Washington

(Filed Nov. 16, 1998)

BEFORE: CANBY AND TASHIMA, CIRCUIT JUDGES, and TAKASUGI**, DISTRICT JUDGE.

Montana state prisoner Fred Van Dyken filed a 28 U.S.C. § 2254 habeas petition challenging his conviction

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Robert M. Takasugi, Senior United States District Judge, for the Central District of California, sitting by designation.

for deliberate homicide. He alleged that a jury instruction in his second trial misconstrued the word "purposely" as that word is used in the state's deliberate homicide law. The district court denied the petition. Van Dyken then moved the district court to reconsider its denial in light of a newly-issued Montana Supreme Court opinion that disapproved of a similar jury instruction. The district court denied the motion on the ground that any error was harmless. This court issued a certificate of appealability, and Van Dyken now appeals. We review de novo the district court's denial of Van Dyken's habeas petition, *Bonillas v. Hill*, 134 F.3d 1414, 1416 (9th Cir. 1998), and we affirm.

BACKGROUND

In 1984, Deputy Sheriff Allen Kimery stopped Van Dyken on a Montana highway for allegedly stealing gasoline from a Missoula convenience store. Van Dyken then killed Kimery with a single shot from a .357 Magnum pistol. Van Dyken never denied that he fired the shot, but he contended that he was intoxicated and did not intend to hit the officer when he fired. Montana twice tried Van Dyken for deliberate homicide, which the state defines as "purposely or knowingly caus[ing] the death of another human being." Mont. Code Ann. § 45-5-102 (1985). At the first trial, the judge instructed the jury that:

> For deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the (result of) death, but that he did it with the knowledge that he was causing or with the purpose to cause death.

> More specifically, the mental state "purposely" is the more serious or wrongful mental state and implies an objective or design. It is where a person's conscious object is to cause a particular result.

The jury hung because the jurors could not unanimously agree that Van Dyken was guilty of deliberate homicide as opposed to negligent homicide.

At the second trial, the court granted the state's request, over defense objections, to deliver an alternative deliberate homicide instruction that defined "purposely" as intending to engage in the conduct that caused death. The alternative instruction, which was based on language in *Montana v. Sigler*, 688 P.2d 749, 755 (Mont. 1984), *overruled in part by Montana v. Rothacher*, 901 P.2d 82, 85-87 (Mont. 1995), stated that:

> A criminal homicide is deliberate homicide if it is committed purposely or knowingly.
>
> *A person acts purposely with respect to conduct which is an element of the offense* or to a result which is an element of the offense *when he has the conscious object to engage in that conduct* or to cause that result.

(Emphasis added). The second jury convicted Van Dyken of deliberate homicide, and the court sentenced him to life imprisonment without the possibility of parole.

On direct appeal, Van Dyken argued that the instruction in the second trial was erroneous because it did not require the jury to find that he had intended to kill Kimery. *See Montana v. Van Dyken*, 791 P.2d 1350, 1362 (Mont. 1990). The Montana Supreme Court affirmed the conviction, reasoning that "a defendant can properly be

convicted of deliberate homicide even though he may not have intended that the death result from the act where he contemplated the same kind of harm or injury to the victim." *Id.* (citing *Sigler,* 688 P.2d at 757-58).

The federal district court then denied Van Dyken's subsequent habeas petition. Following that denial, the Montana Supreme Court partially overruled *Sigler. Rothacher,* 901 P.2d at 85-87. The law in Montana remains that a person kills purposely, even though he did not intend to kill, if he contemplated the same kind of harm to the victim. *Id.* at 85. The court in *Rothacher* concluded, however, that some of the language in *Sigler* had misled lower courts by suggesting that a person could kill purposely regardless of what result he intended. *Id.* at 85-86. Therefore, fearing that juries might confuse deliberate homicide with negligent homicide, the court expressly disapproved of jury instructions that failed to clarify the intent requirement of Montana's deliberate homicide law. *Id.* at 86-87. Van Dyken moved the district court to reconsider its denial of his habeas petition in light of *Rothacher.* The district court then concluded that, even if the challenged instruction were constitutionally defective, the error was harmless.

DISCUSSION

We assume for purposes of decision that the challenged instruction was constitutionally defective because it failed to make clear that a conviction under the "purposely" prong of Montana's deliberate homicide statute required a finding either of an intent to kill or of an intent to inflict an injury similar to the injury actually sustained

by the victim. *See Carella v. California*, 491 U.S. 263, 265 (1989) (holding that Due Process Clause requires government to prove every element of a charged offense); *Hennessy v. Goldsmith*, 929 F.2d 511, 514 (9th Cir. 1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . . "). We conclude that the error was harmless, however, because we are not in grave doubt about whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *See California v. Roy*, 117 S. Ct. 337, 338-39 (1996) (holding that *Brecht/O'Neal* standard applies to collateral review of erroneous jury instruction).

Van Dyken argues that the first jury's inability to reach a unanimous verdict is persuasive evidence that the instructional error in the second trial was prejudicial. The second trial differed from the first trial in two important respects, however. In contrast to the instruction given at the second trial, the deliberate homicide instruction given during the first trial suggested that "purposely" required an intent to cause death; it did not state that the term also included an intent to cause an injury that was similar to the victim's actual injury. Thus, the first instruction imposed a greater burden on the prosecution than the deliberate homicide law actually required.

Even more important is the fact that Van Dyken testified only at his second trial. He could properly be found guilty of deliberate homicide if he killed Kimery either "purposely" or "knowingly." His testimony, when coupled with the other evidence, leaves us with no doubt that the jury, if properly instructed, would have found that he acted "purposely" in that he at least contemplated

the same kind of harm that Kimery suffered. The same evidence also establishes conclusively that Van Dyken "knowingly" killed Kimery: that is, in terms of the instruction correctly given, he was "aware that it [was] highly probable that the result [would] be caused by his conduct or the circumstance."[1] Van Dyken stated that he saw a police officer approach his car, that he aimed his pistol in the officer's general direction, that he intended to discharge the weapon, and that he knew that guns could kill. In addition, physical evidence established that Van Dyken must have fired his pistol with his right hand, turning and holding it outside of the driver's side window, and that Kimery was standing within a few feet of the weapon when Van Dyken pulled the trigger. Moreover, two hours before the shooting, witnesses heard Van Dyken declare that he would shoot a police officer if pulled over. Given this evidence, we conclude that the error in one prong of the deliberate homicide instruction had no substantial effect on the verdict.

We also note that the trial court properly instructed the jury regarding negligent homicide. The judge explained that:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result

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[1] The trial judge explained to the second jury that:

> A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance.

> from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation.

This instruction lessened the potential for the jury to conflate deliberate and negligent homicide. The jury was also thoroughly instructed on intoxication and its possible effect on intent and knowledge. In light of all the instructions, the possibility that the error in defining "purposely" misled the jury was exceedingly small. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (court determining whether erroneous jury instruction was harmless should consider instructions as a whole).

CONCLUSION

We assume for purposes of decision that the deliberate homicide instruction delivered during Van Dyken's second trial was constitutionally defective because it failed to set forth accurately the mens rea requirement for deliberate homicide. Like the district court, however, we conclude that the error was harmless because it had no " 'substantial and injurious effect in determining the jury's verdict.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

FRED DANIEL VAN DYKEN,

Petitioner,

-v-

RICK DAY, Director, Montana Department of Corrections,

Respondent.

CV 94-6-M-CCL

ORDER

(Filed Mar. 11, 1997)

* * *

Before the court is Petitioner's motion to alter or amend this court's judgment. Petitioner filed the motion pursuant to Rules 52 and 59, Fed. R. Civ. P. Respondent initially asserted that the Petitioner's motion presented no argument which the court had not already considered and rejected, and on this ground urged denial of the motion. The court agreed that the initial motion presented no new argument that had not already been considered and rejected. However, Petitioner subsequently filed a supplemental brief based upon a change in Montana case law regarding what is a proper mental state jury instruction for the crime of deliberate homicide.

Petitioner now asserts that *Montana v. Rothacher*, 901 P.2d 82 (Mont. 1995) (overruling to some extent the mental state jury instruction approved in *State v. Sigler*, 688

P.2d 749 (1984), *State v. McKimmie*, 756 P.2d 1135 (1988), and *State v. Byers*, 861 P.2d 860 (1993)), has invalidated the jury instructions given in Petitioner's second trial by clarifying that when the "purposely" prong of the mental state is at issue, the act in question must have been performed, at minimum, with the intent to cause an injury similar to the victim's injury. The jury instruction actually given required only that the jury find that the Petitioner intended to commit the act, without regard to what result he might have intended.[1]

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[1] The relevant portion of the jury instructions reads as follows:

> A criminal homicide is deliberate homicide if it is committed purposely or knowingly.
>
> A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.
>
> A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.
>
> * * *
>
> To convict the Defendant of deliberate homicide, the State must prove the following three elements:

Petitioner took the stand at his 1987 trial and testified that he saw a patrol vehicle's flashing lights, saw an officer walking up to his vehicle, and "threw a bullet over [his] left shoulder", but that he had no intent to kill the officer nor even any intent to shoot the officer or cause physical injury to the officer. The bullet that Petitioner "threw" over his shoulder pierced the heart of Missoula County Deputy Sheriff Allen Kimery, killing him. Expert testimony at trial indicated that the gun was fired from a short distance of approximately three feet.

> First, that the Defendant performed the acts causing the death of Alan Kimery;
>
> Second, that when the Defendant did so, he acted purposely or knowingly;
>
> Third, that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse. The State has the burden of proof to exclude mitigation beyond a reasonable doubt.

After giving an "acquittal first" transition instruction, the court also instructed the jury regarding negligent homicide:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

See Resp. Brief in Supp. of Mot. for Summ. Judg., App. B.

Petitioner's theory of the case was that he had perhaps committed negligent homicide, but not deliberate homicide. As Petitioner claims, however, the erroneous jury instruction as to the mental state of deliberate homicide gathers into its reach merely negligent conduct. *See State v. Lambert*, 929 P.2d 846 (Mont. 1996); *Byers v. Mahoney*, 929 P.2d 202 (Mont. 1996); *Rothacher*, 901 P.2d at 87. Therefore, Petitioner's argument is that he was denied a fair trial because the erroneous mental state instruction allowed the jury to convict him of deliberate homicide for merely negligent conduct. According to Petitioner, the erroneous instruction nullified his defense that he lacked the requisite mental state to commit deliberate homicide.

The jury instructions given in Petitioner's case were reviewed by the Montana Supreme Court and found to be sufficient. *Montana v. Van Dyken*, 791 P.2d 1350, 1362 (Mont.), *cert. denied*, 498 U.S. 920 (1990). However, Petitioner did not submit an appropriate mental state instruction and did not argue this precise point on direct appeal, arguing instead that the specific intent to kill must be an element of the crime. That question is well settled under Montana law, however, and it was proper that Petitioner's argument failed. *See, e.g., State v. Leyba*, 915 P.2d 794 (1996). What has changed is the Montana Supreme Court's interpretation of what jury instructions are sufficient to impart the meaning of the "purposely or knowingly" mental state. Petitioner's second trial fell squarely between *State v. Sigler*, 688 P.2d 749 (Mont. 1984), and *Rothacher*, 901 P.2d 82 (Mont. 1995), and during this period the Montana Supreme Court's pronouncements regarding proper instruction became somewhat clouded.

Respondent argues that this court must not apply the law of *Rothacher* to grant the petition for writ of habeas corpus because the error asserted pursuant to *Rothacher* is not of a constitutional magnitude. However, it is settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See also Hennessey v. Goldsmith*, 929 F.2d 511, 514 (9th Cir. 1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . . "). *Sandstrom v. Montana*, 442 U.S. 510 (1979), also underscores the constitutional importance of properly instructing a jury as to the required mental state of the offense of deliberate homicide.

However, even granting that *Rothacher* should be given retroactive application to Petitioner's collateral attack upon his sentence, and even assuming that the erroneous jury instruction as to mental state constitutes a constitutional trial error, this court is not prepared to grant the petition for writ of habeas corpus.

The standard for the granting of a habeas corpus petition is that the court must find that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, ___, 115 S. Ct. 992, 994-99, 130 L.Ed.2d 947 (1995). At the least, a court must have "grave doubt" as to whether there has been such a substantial and injurious effect or influence on the jury's verdict. *Id.* After careful scrutiny of the record, this court is convinced that any error in instructing the jury was harmless beyond a reasonable

doubt. *See Rose v. Clark*, 478 U.S. 570, 576 (1986) (An otherwise valid conviction may be upheld in spite of constitutional error in jury instructions if court "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Petitioner's own testimony at trial shows that his conduct was not merely negligent. Petitioner, a man of above-average intelligence, TR 1806:10-13, testified that after Officer Kimery stopped his car, Petitioner saw Officer Kimery walk up to his car, TR 1624:18, and Petitioner fired his .357 magnum revolver at Officer Kimery – at a distance of less than a car's length. While denying that he had any intent to harm Officer Kimery, the only reason Petitioner could muster to explain his conduct was to say that he "just wanted to get out of there." TR 1606:22-23, 1607:13. Petitioner testified that he did not aim the gun directly at Officer Kimery, but Petitioner did acknowledge that he intended to shoot the gun, TR 1612:20, and that he aimed the gun in Officer Kimery's "general direction," TR 1634:19. Petitioner's own testimony makes clear that this shooting was no accident.

In addition, the State's case against Petitioner convincingly showed that Petitioner had a motivation to kill Officer Kimery in that Petitioner was driving a stolen vehicle, had a stolen gun in his possession, and was at that time on probation for a previous car theft. Additionally, just hours before Petitioner shot Officer Kimery, two witnesses heard Petitioner boast that he would use his gun to "blow away" a cop. TR 467:1-2; 514:17-18. The physical evidence indicated that Petitioner shot Officer Kimery by holding his gun outside the window of his car, TR 1278:23-25, 1279:1-2, and firing it at Kimery at nearly

point-blank range. TR 1292:18-21. Numerous witnesses who observed Petitioner both before and after the shooting testified that Petitioner was functioning quite well and did not appear to be intoxicated.

A review of the entire record leaves the court with the definite conviction that Officer Kimery's death was not caused by Petitioner's negligence but was caused by Petitioner's intention to commit serious bodily harm to Officer Kimery. Petitioner knew his gun contained live ammunition. Petitioner knew he was shooting at Kimery from a distance of less than 10 feet. Petitioner revealed in his testimony that his sole purpose or desire, at the time he shot Officer Kimery, was to flee in his car. Beyond any reasonable doubt, Petitioner knew of the substantial likelihood that his conduct would result in Kimery's death or serious injury.

Petitioner received a fair trial and a fair opportunity to present his version of the facts. The trial judge instructed the jury that they could consider Petitioner's voluntary intoxication in determining whether he possessed the requisite mental state. The trial judge also instructed the jury on the elements of the offense of negligent homicide. The trial judge permitted Petitioner's expert witness to testify that Petitioner lacked the requisite mental state to commit deliberate homicide due to alcohol intoxication. Petitioner had every opportunity to convince the jury that he did not possess the requisite intent to commit deliberate homicide, and this court is confident that correction of the potentially defective "purposely" jury instruction would not have changed the verdict.

For all these reasons and based upon the entire record, this court finds that the error in the mental state instruction, if any, is harmless beyond a reasonable doubt.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's motion to alter or amend judgment pursuant to Rules 52 and 59, Fed. R. Civ. P., is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 11th day of March, 1997.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX C

Filed Dec. 13, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
97-35550

FRED VAN DYKEN,

Petitioner-Appellant,

-vs-

RICK DAY,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Montana, Missoula Division

APPELLANT'S BRIEF

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[Pages 51-54 (Section III B) Of The Brief
Are Printed Below (footnotes omitted)]

* * *

B. **A fortiori**, VanDyken's conviction cannot stand if a modified **Carella** standard is used to assess harmless error.

As first pointed out in *Carella v. California*, 491 U.S. 263, 270-272 (1989) an erroneous jury instruction incorporating an illegal presumption or omitting or misdescribing an element of the offense may have to be evaluated for harmless error in a different manner than other trial errors. This is because an erroneous elements instruction can cause the jury to disregard important evidence or consider it in the wrong way, thus skewing the deliberative process more pervasively than, say, an item of erroneously admitted evidence would do. Also, of course, a defective elements instruction suggests that a jury may never have made an actual finding of guilt beyond a reasonable doubt as to every element of the offense, as required by *Winship*. *California v. Roy*, 117 S.Ct. at 339 (Scalia concurring); *U.S. v. Gaudin*, 115 S.Ct. 2310, 2319-20 (1995).

In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996), an [sic] habeas case, this Court applied the *Carella* harmless error analysis to a defective elements instruction, holding that the error could be harmless "only if review of the facts found by the jury establishes that the jury necessarily found the omitted element," 81 F.3d at 867.

In *California v. Roy*, 117 S.Ct. 337 (1996), the U.S. Supreme Court reversed, holding that the Ninth Circuit had erred by applying too rigorous a standard in lieu of the *Kotteakos* standard mandated by *Brecht-O'Neal*. In a concurrence, however, two justices opined that the Ninth Circuit was correct in assessing instructional errors for

harmlessness using the method of *Carella*, but that in doing so it should utilize the *Kotteakos* "fair assurance" standard of certainty, rather than the *Chapman* "beyond a reasonable doubt" standard required on direct review. As a result, it is still an unsettled question whether or not error in elements instructions should be assessed by means of the special method outlined in *Carella*, or, on the contrary, should be evaluated for harmlessness in the same manner as all other trial errors. See, *Roy v. Gomez*, 108 F.3d 242, 243-246 (9th Cir. 1997); *Peck v. U.S.*, 102 F.3d 1319, 1320-27 (2nd Cir. 1996).

It certainly makes a difference which method is used. In the instant matter, for instance, use of the *Carella* model would lead to a summary determination that the error was not harmless, without the necessity to consider all the factors which have been reviewed here. This is because the jury's guilty verdict in no way demonstrates that the jury "necessarily found" that VanDyken intended or foresaw Kimery's death. With the *Sigler* instruction, it is perfectly possible that the verdict rested on a determination that VanDyken was simply not unconscious during the relevant transaction; or, alternatively, on the determination that he meant merely to shoot the gun, or meant to engage in a number of other unspecified acts, none of which was necessarily connected to any contemplation of or desire for a person's death. In these circumstances, "no court could ever determine that the instructions on the element were superfluous, since the error in the instructions went to the ultimate fact that the jury was required to find," *Pope v. Illinois*, 481 U.S. 497, 510 (1987).

It would appear that a modified *Carella* standard comports with the common-sense notion that when a jury is seriously misled as to exactly what the State has to prove, and the jury has to find, to establish guilt of the crime charged, then it makes little sense to ask if that error affected the verdict. *Of course* it affected it, in the sense that the jury necessarily fitted all the evidence into the wrong framework, drew the wrong conclusions from the predicate facts; and may well have convicted the defendant of the wrong crime (possibly a non-existent crime). Logically, the only way the jury could have avoided doing these things would be if it simply never heard, read or used its instructions at all.

This being the case, a rule like *Carella's* which "circumscribes" the scope of the harmless error review seems preferable from the logical point of view. True, it makes this kind of error a kind that can rarely be harmless. But that is not inappropriate when the error has the inevitable effect of directing the jury to process *all the evidence* in the wrong way; or, in other words, when it focusses [sic] the jury's analytical attention on a perhaps fictitious crime, but at any rate on a crime with which the defendant on trial was never charged.

* * *

APPENDIX D

Filed Dec. 13, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
97-35550

FRED VAN DYKEN,

Petitioner-Appellant,

-vs-

RICK DAY,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Montana, Missoula Division

APPELLANT'S BRIEF

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[Pages 41-51 (Section III A) Of The Brief
Are Printed Below (footnotes omitted)]

* * *

A. VanDyken's conviction cannot stand if the lenient **Brecht-Kotteakos** standard is used to assess harmless error.

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) and *O'Neal v. McAninch*, 115 S.Ct. 992 (1995), the U.S. Supreme Court adopted a more lenient standard for evaluating the potential harmlessness of constitutional errors, when such errors were being claimed under in habeas proceedings, as opposed to direct appeal. The standard adopted for habeas proceedings was that articulated in *Kotteakos v. U.S.*, 328 U.S. 750, 764-765, 776 (1946):

> "if the court's conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

This is the most lenient harmless error standard in use, in the sense that it permits more judgments predicated on constitutional trial error to be upheld than any other articulated standard. Even so, as *O'Neal* made clear, it does not relieve the beneficiary of the error (the State) of the burden of showing that an error was harmless, *O'Neal*, 115 S.Ct. at 995-96. Furthermore, it in no way changes the basic structure of harmless-error analysis,

which is to determine whether the error probably affected the result, not whether the result probably would have ensued without the error.

> "Consistent with the jury trial guarantee, the question a reviewing court must consider is not what effect the constitutional error might generally be expected to have on a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless error review looks, we have said, to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."
>
> –*Sullivan v. Louisiana*,
> 113 S.Ct. 2078, 2081-82 (1993).

Accord, Yates v. Evatt, 111 S.Ct. 1884, 1893 (1991); *Pope v. Illinois*, 481 U.S. 497, 509-510 (1987).

Leaving aside, then, for the time being, the question whether an error in the jury instruction that defined the crime "necessarily circumscribes the availability of harmless error analysis," *Carella v. California*, 491 U.S. 263, 269 (1989), let us see if the U.S. District Court's finding of harmless error in the VanDyken trial is valid under *Kotteakos*.

The first thing that leaps out at us from the District Court's analysis is that it takes no account whatsoever of the objective facts in the record which give some indication of whether or not "the error itself had substantial influence on the jury." It doesn't even mention that a different intent instruction was given at VanDyken's first trial, that after that instruction was given the jury hung, and that the prosecutor twice asserted on the record that it was the intent instruction that caused the jury to hang. Nor does it mention that the prosecutor relied explicitly and extensively on the erroneous instruction in his closing argument at the second trial. Nor does it even so much as allude to the fact that the prosecution devoted vast time and effort between trials attempting to keep the correct instruction from being given and to cause the erroneous instruction to be given – surely an indication that the State, at least, believed that the intent instruction would have "a substantial influence on the verdict." The District Court's analysis ignores every fact of record in this case from which one could reach reasonable conclusions about *what influence the error had upon what the Jury actually did.*

In fact, the District Court opinion in this case does just what the *Kotteakos* standard tells it not to do: "the inquiry *cannot* be merely whether there was enough to support the result, apart from the phase affected by the error." Yet the District Court, in concluding that the erroneous intent instruction was harmless, does literally nothing but catalogue the evidence of intent presented at the second trial. It completely dispenses with any discussion or analysis of the role the erroneous instruction

played in the actual case – which was a conspicuous role, to say the least.

Not only does the District Court disregard the admonition of *Kotteakos* to pay attention to what actually happened; it also disregards the admonition of *Sullivan* not to let harmless error analysis degenerate into the creation of a hypothetical verdict. Here is the District Court's final conclusion in this matter:

> "A review of the entire record leaves this court with the definite conviction that Officer Kimery's death was not caused by petitioner's negligence, but was caused by petitioner's intention to commit serious bodily harm to officer Kimery. Beyond any reasonable doubt, petitioner knew of the substantial likelihood that his conduct would result in Kimery's death . . . "

– ER, 99.

This conclusion suffers from legal error to an extreme degree, of a kind precisely identified in *California v. Roy*, 117 S.Ct. at 339:

> "To allow the error to be cured in this fashion would be to dispense with trial by jury. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal."

As stated in *Carella v. California*, 491 U.S. at 269:

> "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of

> a defendant resulting from the court's failure to instruct it to find an element of the crime. . . .
>
> ". . . . [this problem] would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.' "

Accord *Sullivan*, 113 S.Ct. at 2082.

The District Court, then, in denying VanDyken habeas relief on the basis of harmless error, fell into the two analytical errors most often condemned in this area of law: (1) it ignored the objective facts of the proceedings from which a person could draw reasonable conclusions about what the jury actually did, and whether the error really was significant or not; (2) it substituted its judgment of guilt beyond a reasonable doubt, based on its view of the evidence, for the jury's judgment. This being so, it still remains to be seen whether the court's conclusion, though wrongly arrived at, is in any measure sustainable.

Here are the main indications that the error was not harmless:

1. The outcome of the trial hinged on the jury's determination on intent. The parties, realizing this, offered radically different versions of an intent instruction at both trials, and litigated the matter extensively between trials. Their disagreement on this issue for the last twelve years has focused on the so-called *Sigler* instruction, an intent instruction which lessens the State's burden of proof by permitting the jury to find criminal

intent in some manner from an undirected consideration of "conscious conduct."

2. The intent instruction issue was characterized by the prosecutor at various times as "fundamental" and as "critical." The State thought it was vitally important, especially at the second trial, for the jury to receive an instruction that lessened the State's burden of proof on the key contested element of the offense. Pursuant to this strategic judgment, one of the prosecution's primary goals from start to finish was to persuade the court to give a *Sigler* instruction and refuse the defense instructions – both the *Weinberger* instruction (Instruction G), and the *Lambert* instruction (the statutory definitions of purposely and knowingly with the "conduct" and other irrelevant subparagraphs eliminated). The State invested a great deal of time and energy in this project, as indicated by the elaborate briefs and oral arguments it submitted on the issue.

3. One good indication that a matter had substantial influence on a jury is that the parties thought it would and did. Neither the prosecution nor the defense in a major jury trial can afford to, nor do they, waste their time on unimportant or collateral matters. While their judgments on what will affect the jury are not, of course, infallible, they are focused by adversarial interest, and honed fine by familiarity with the nuances of the proceeding. The fact that both the prosecution and defense always thought the intent instruction was critical is a far more reliable indication of its importance than a judgment made on a cold record a decade later by a judge who was entirely unfamiliar with the emotional tone and

dynamics of the proceedings, and, for that matter, unfamiliar with State jury trial practice in general.

4. Another very good indication of what substantially influenced a jury is *evidence* of what influenced it. The first VanDyken trial jury requested a supplemental instruction on intent on its own initiative. It is the only thing it requested. As the trial judge remarked at the time, the jury was "paying a lot of attention to the definitions of knowingly and purposely" [ER, 8].

5. The State twice represented in open court that the first trial jury's failure to agree on a verdict was *caused* by the supplemental intent instruction. This unequivocal declaration is binding on the State, and is in many respects conclusive of the matter. According to the State, the intent instruction not only had substantial, it had outcome-determinative effect on the jury. How can the State now argue that the instruction (in the words of *Kotteakos)* "did not influence the jury, or had but very slight effect?"

6. The prosecutor structured his entire closing argument at the second trial around the *Sigler* intent instruction. First, he carefully quoted the instruction for the jury (it was the *only* instruction he mentioned in his lengthy argument); then he even more carefully paraphrased it for the jury, quoting *only the objectionable, burden-lessening language* [ER, 43, lines 3-11]. "Think about those words," he said. Then he proceeded to articulate evidence of isolated items of conduct "of which the defendant was aware," as conclusive evidence of criminal intent. One of the matters he most relied upon was the State psychiatrists' conclusion that VanDyken acted "with purpose"

because he intended to shoot the gun. Rarely if ever did the prosecutor suggest that VanDyken intended to kill in the normal – and legally correct – sense of the term. Time and again, he asked the jury to convict on the alternative *Sigler* theories: (1) that the defendant was not unconscious or asleep during the transaction; (2) that he was "aware of" certain isolated segments of his conduct. If the *Sigler* instruction did not have a substantial influence on the jury, why did the prosecutor, in one of the most important cases of his career, organize his closing argument around the burden-lessening portion of that instruction?

7. No one was in a better position to know what was going to influence the second trial jury than the prosecutor. All his actions reveal he thought the *Sigler* instruction would have immense influence. Probably for that reason, the State never raised the issue of harmless error in this case, either on direct appeal or in the U.S. District Court. While harmless error is probably not an issue subject to technical waiver, still "the government's failure to brief and argue harmless error is itself an indication it recognized how harmful the [erroneous instruction] was," *Lufkins v. Leapley*, 965 F.2d 1477, 1486-87 (8th Cir. 1992).

Now, as against these indications – all drawn from the record – that the error was not harmless, what support is there for the District Court's conclusion that it was harmless? Only speculation. Only its supposition that, because the State's evidence of criminal intent seemed to it, from a cold record, strong and convincing, the evidence must have affected the jury the same way, to a

degree that they paid no or scant attention to the instruction on intent. The evidence introduced by the State at trial is, of course, what it is; but the fact remains, *there is no evidence at all the intent instruction was unimportant to the jury.*

The State will presumably try to characterize the evidence of intent offered at trial as "overwhelming evidence." The record – not anyone's opinion, but the record – demonstrates that this would be a mischaracterization. The evidence catalogued by the habeas court as convincing it beyond a reasonable doubt that VanDyken meant to kill Kimery, is identical to the catalogue of evidence marshalled by the prosecutor in his closing argument *at the first trial* in an attempt to convince the jury of the same proposition. That jury hung. Not only did it do that, but – according to juror affidavits procured and utilized by the State – it hung with some of the jurors voting for mitigated and some voting for negligent homicide, and with the final stage of the deliberations devoted to attempting to arrive at a compromise verdict [ER, 10-11; 18; 19]. Overwhelming evidence, by any definition, does not produce that result.

The history of this case, in fine, is this: the first jury heard the evidence, the strong evidence, of VanDyken's guilt, received a correct instruction on intent, and failed to reach a verdict. The second jury heard the same evidence, received an erroneous instruction lessening the State's burden of proof on intent, and convicted. According to *Kotteakos*, "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . . the conviction

cannot stand." There is not one fact of record concerning "all that happened," that suggests the judgment was not substantially swayed by the error. The conviction cannot stand.

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